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No. 88-217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY and
THE RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF AMICUS CURIAE ASSOCIATION OF TRANSPORTATION PRACTITIONERS IN SUPPORT OF PETITION

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INTEREST OF THE AMICUS CURIAE [1]

The Association of Transportation Practitioners ("ATP"), founded in 1929, is an association of approximately 2,000 lawyers and other transportation professionals who represent their clients, both shippers and carriers, in matters before transportation regulatory agencies, including the Interstate Commerce Commission ("ICC" or "Commission") as well as the courts. ATP members provide business and legal advice concerning the laws and regulations applicable to transportation. A primary goal of the ATP is the promotion of effective and fair adjudication of transportation disputes.

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[1] This brief is filed pursuant to Supreme Court Rule 36 and is accompanied by the written consent of petitioner and respondents.

The ICC's independent litigating authority serves that goal by enabling the ICC to intervene in lawsuits that involve collateral attacks on final ICC orders. In those situations, the representations of the ICC are critical aids to the bar and the courts in determining the scope and effect and increasing understanding of the ICC orders under attack. Because members of the ATP rely on the certainty and clarity of ICC orders in advising their clients, the ATP has a strong interest in the illumination that ICC intervention provides in the case of a collateral attack.

ATP believes the present case is one to which the ICC's independent litigating authority to protect a final order from collateral attack properly should apply. If the Department of Justice ("DOJ") is allowed to veto the ICC's participation in this and like cases, collateral attacks on ICC orders will be encouraged. At a minimum, this would make reliance on final ICC orders a matter of great risk.[2]

In addition, the members of the ATP are concerned that the effect of placing ICC intervention under the control of the DOJ could undermine the ability of the ICC to carry out its function as an independent regulatory agency. The views of the ICC on matters of transportation policy do not always coincide with those of the DOJ. Whatever the merits of their respective views in any given case, the ATP believes it is essential that the voice of the ICC always be heard. No one (including, as we understand it, the Solicitor General) questions the right of the ICC to present its own views when its orders are directly appealed to a court of appeals or to this Court. It is essential that the same right exist where, as here, the attack on an ICC order assumes an indirect form. Any other rule would seriously compromise the independence of the agency as a transportation policy-maker and

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[2] The ATP takes no position here on the merits of the underlying dispute.

adjudicator—a role upon which all parties involved in transportation rely.

For reasons set forth in the ICC's petition, and those set forth below, this Court should uphold the Commission's right to continue this litigation in its own right, by its own attorneys.

SUMMARY OF ARGUMENT

Congress through 28 U.S.C. § 2323 and 49 U.S.C. § 10301(f) has vested the ICC with independent litigating authority not subject to control in any manner by DOJ. The Commission has the right to intervene "in any action involving the validity" of one of its orders, pursuant to section 2323, and has the power to "appoint and supervise" its own attorneys to represent the ICC "in any case in court," pursuant to section 10301(f). Legislative history confirms congressional intent to place no restrictions on the ICC's litigating authority. In particular, Congress in 1910 rejected a presidential proposal to put ICC litigation under the control of DOJ, and then in 1974, Congress literally guaranteed the independence of the ICC from DOJ, during the course of debates over amendments to the Hobbs Act.

There is a long history of independent ICC intervention in private lawsuits where the validity of an ICC order is in question. The ICC has intervened in these private disputes without seeking DOJ authorization. Congress undoubtedly has been aware of these ICC interventions, especially through ICC annual reports submitted pursuant to 49 U.S.C. § 10311. Reports just prior to the 1974 debates, for example, notified Congress of significant litigation in which the ICC had intervened without DOJ.

DOJ does not otherwise have statutory authority to control ICC litigation. ICC litigating authority is an express exception to the statutory powers of the Attorney General (28 U.S.C. § 516) and the Solicitor General (28 U.S.C. § 518) to supervise government litigation. *See*

United States v. Providence Journal Co., —— U.S. ——, 108 S. Ct. 1502, 1509 n.9 (1988).

Finally, the ICC, as an independent regulatory commission, has been given an independent statutory mission by Congress to regulate interstate commerce. Independent litigating authority is integral to the ICC's ability to carry out its mission. Interference by DOJ with the ICC, therefore, amounts to an unconstitutional overreaching of executive power. *See Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

ARGUMENT

I. THE ICC HAS INDEPENDENT LITIGATING AUTHORITY

A. The ICC Has Clear Statutory Authority To Intervene In Any Case Where The Validity Of Its Order Is In Question

There are two separate statutes that confer on the ICC clear authority to litigate independently in a case such as this: section 2323 of the Judiciary Code, Title 28, and section 10301(f) of the Interstate Commerce Act, Title 49.

By the plain wording of 28 U.S.C. § 2323, Congress has vested the ICC with the authority to intervene in any case to protect the validity of its orders. The statute specifically makes the ICC's litigating authority independent and not subject to control by DOJ in any manner:

> The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, *in any action involving the validity of such order* or requirement . . . .

(Emphasis added.) The statute does not qualify or limit the scope of the ICC's power to litigate to protect the validity of an order, nor has Congress restricted this power to a particular type of court proceeding.

Equally plain from the statutory language is the inability of the DOJ to interfere with the ICC's exercise of its authority to intervene to protect its orders subject to attack. Section 2323 in pertinent part provides that:

> *The Attorney General shall not dispose of or discontinue said action* or proceeding *over the objection of such party or intervenor*, who may prosecute, defend or continue said action . . . unaffected by the action nor nonaction of the Attorney General therein.[3]

(Emphasis added.) This Court made clear in *United States v. I.C.C.*, 337 U.S. 426, 432 (1949), that the statute contemplates that the DOJ and the ICC might appear at times in opposition as separate and distinct parties with clashing positions:

> For, whether the Attorney General defends or not, the Commission and the railroads are authorized to interpose all defenses to the Government's charges and claims . . . . In this case [they] have availed themselves of this statutory authorization. They have vigorously defended the legality of the allowances and the validity of the Commission order at every stage of the litigation.

Section 2323 thus accommodates the interests of the executive branch and those of the ICC by ensuring that each can be represented but neither controls the other in court.

The Interstate Commerce Act itself contains an additional source of independent ICC litigating authority where it gives the ICC the right to hire its own attorneys. Section 10301(f) provides, *inter alia*, that the Chairman of the ICC shall "appoint and supervise . . . attorneys to provide legal aid and service to the Commission . . . *and to represent the Commission in any case in court.*" (Emphasis added.) Like section 2323 of Title

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[3] The statute's reference to the ability to "prosecute," as well as defend, an action indicates that the ICC's independent litigating authority is not limited to defense of its order on direct appeal to a reviewing court.

28, section 10301(f) is a grant of unqualified litigating authority outside of the control and supervision of the Attorney General, consistent with the nature and purposes of the ICC.[4] The Act nowhere limits the ICC's attorneys to litigation in particular proceedings or otherwise designates that in some instances they will answer not to the Chairman of the Commission but to the Attorney General.

B. A History Of Congressional Review Supports The Independence Of The ICC's Litigating Authority

At various instances since the establishment of the ICC in 1887, Congress has considered legislation affecting the ICC's independent litigating authority. On every such occasion, the ICC's broad independence from DOJ has been reaffirmed.

First, the evolution of the language of section 10301 (f) reflects congressional intent to establish and maintain unrestricted ICC litigating authority. That section originated in section 5 of the Hepburn Act of 1906, where Congress authorized the Commission to "employ special counsel in any proceeding under this Act . . . ."[5] When the short-lived commerce court was created a few years later, the authority was amended by section 13 of the Mann-Elkins Act of 1910 to employment of "attorneys . . . to appear for and represent the commission in any case pending in the commerce court . . . ."[6] Following dissolution of the commerce court in 1913,

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[4] *See F.T.C. v. Guignon*, 390 F.2d 323, 325 (8th Cir. 1968), contrasting the FTC's section 9 enforcement power, which the court found not independent of the Attorney General, with "a grant of general authority for the agency's lawyers to represent it in court, *as in 49 U.S.C.A. 16, par. (11)* . . . ." (Emphasis added.) 49 U.S.C. 16, par. (11) was subsequently recodified as section 10301(f)(1). The recodification made no substantive change in the statute. *See Burlington Northern v. Oklahoma Tax Comm'n*, —— U.S. ——, 107 S. Ct. 1855 (1987).

[5] Pub. L .No. 59-337, 34 Stat. 591.

[6] Pub. L. No. 61-218, 36 Stat. 555.

Congress deleted the reference to the "commerce court" and substituted the current language: "in any case in court."[7] This last change, made over 60 years ago, reflects a removal of the only arguable restriction ever placed on the forum in which ICC attorneys could litigate.

Second, in 1910, Congress also debated a proposal by President Taft to place all litigation involving ICC orders under the DOJ.[8] Congress rejected that proposal in large part because it would have subjugated the ICC to the Attorney General in contests over Commission orders.[9] The compromise was to permit both the DOJ and the ICC to litigate where the validity of an ICC order was in question. Each body would be free to represent its own views without interference from the other.

The debates in 1910 centered on a danger that DOJ control over ICC litigation would destroy the ICC as an independent commission created by the legislature. The following statement by Representative Hitchcock fairly summarizes the concerns of that Congress over President Taft's proposal:

> The whole tendency of this bill as it has been presented is to belittle the commission. The bill tends to put the [ICC] under the judicial thumb of this new commerce court, which is given almost absolute power. Now if we go yet further and take away from our commission the power which it has heretofore had, to defend in any court the orders which it has issued . . . we complete the work of belittling the commission and extinguish its power of self-preservation. We . . . subordinate it . . . to the Attorney General . . . . He is not the proper officer to

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[7] Pub. L. No. 61-152, 41 Stat. 492 (1920).

[8] *See* R. E. Cushman, *The Independent Regulatory Commissions* 96-99 (1941); *see also* H.R. Rep. No. 923, 61st Cong., 2d Sess. 3 (1910).

[9] *See generally* 45 Cong. Rec. 3355-6, 4517, 4575-7, 5416, 5516, 6391-4, and 6451 (1910).

> control, prosecute and defend cases involving the powers of the Interstate Commerce Commission.[10]

Congress in 1910 did not want ICC orders defended only by the inexpert (and possibly antagonistic) DOJ. The Senate Minority Report recommending rejection of President Taft's proposal warned that DOJ control over litigation involving an ICC order would offer "the amazing spectacle . . . constantly presented of a review of the orders of the commission not by a court, but by the Department of Justice . . . ." [11] Compounding the problem would be the lack of expertise in the DOJ regarding "the vast details of evidence" and "the complications and intricacies of rates and transportation conditions." [12]

The Senate Committee on Governmental Affairs in 1977 reached a similar interpretation of the 1910 legislative history as confirming the independent litigating authority of the ICC:

> As originally established, the ICC had independent litigating authority. The Interstate Commerce Act provided that the 'Commission in its own name' could apply to the courts for enforcement of its orders. But in 1910, as an alternative to vesting all ICC litigating powers in the Justice Department, Congress modified that authority [in the Mann-Elkins Act of 1910]. The act was further amended to read that the Commission may employ attorneys 'to appear for or represent the Commission *in any case in court.*' On their face, those provisions would appear to grant independent litigating authority.[13]

The most recent and perhaps clearest instance where Congress has stated its intent to maintain the ICC's independent litigating authority occurred in 1974 when Congress amended the Administrative Orders Review

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[10] *Id.* at 5517.

[11] S. Rep. No. 355, 61st Cong., 2d Sess., pt. 2, at 6 (1910).

[12] *Id.*

[13] Senate Committee on Governmental Affairs, 95th Cong., 2d Sess., 5 Study on Federal Regulation 58-59 (Comm. Print 1977).

Act of 1950 (the "Hobbs Act amendments")[14] to place review of ICC orders in the court of appeals rather than the three-judge district courts previously provided by the Urgent Deficiencies Act of 1913.[15] The provisions for ICC litigating authority were left unchanged following assurances from the executive branch that the ICC would continue to control litigation concerning its orders.

Although the Hobbs Act amendments generally involved only procedures for direct judicial review of Commission orders, Congress deliberated the overall question of the ICC's relationship with DOJ in cases concerning ICC orders. The ICC, worried that the change in procedure might be interpreted to restrict its litigating authority, asked Congress to

> guarantee . . . its right to continue to defend its actions at all levels of judicial review independent of the discretion of the Attorney General . . . . In essence, the Commission is concerned that, through the Attorney General's—or the Solicitor General's, at the Supreme Court level—discretionary use of his statutory power to 'control the interests of the government,' they may suffer a damaging qualification of their right to independent representation which they now enjoy as a matter of right.[16]

The ICC then urged an amendment that would (1) designate the Commission instead of the United States as the named party in attacks on ICC orders and (2) deny the Attorney General any "control" over litigation concerning the orders. As part of his showing of the ICC's traditional litigating authority, ICC Chairman Stafford informed Congress that "as a matter of practice, the ICC has since 1913 represented itself before the Supreme Court."[17]

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[14] Pub. L. No. 93-584, 88 Stat. 1917 (1974) (codified as amended at 28 U.S.C. §§ 2341, *et seq.* (1982)).

[15] Pub. L. No. 63-32, 38 Stat. 219.

[16] H.R. Rep. No. 1569, 93d Cong., 1st Sess. 8 (1974).

[17] *Id.* at 17 n.16 (statement of ICC Chairman George Stafford).

Congress decided that the amendments proposed by the ICC were unnecessary, because the statutes preserved all of the independent litigating rights historically accorded the Commission:

> *Objectively, it is difficult to perceive what more the Congress may do legislatively to protect the rights of the ICC* . . . to be shielded from possible caprice . . . . The ICC may still intervene at any level as a matter of right and be represented by its counsel . . . .[18]

To emphasize congressional intent, the Committee insisted that the ICC would remain in control of its litigation.[19] Congress, moreover, relied on *express assurances* from the Attorney General and the Solicitor General that "the independence of the Commission with respect to its ability to participate *fully and equally in all proceedings affecting its interests* will not be tampered with an any respect." [20]

Thus the 1974 Congress was consistent with prior Congresses in deliberating amendments affecting ICC litigation: in every instance, the full independence of the Commission from DOJ has been affirmed. That this au-

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[18] *Id.* at 9 (emphasis added).

[19] The House Report explains that in the face of a threat by DOJ to "terminate a proceeding over their objection . . . . [t]he intent and meaning of the above provisions [28 U.S.C. §§ 2321, *et seq.*] could not be stated with more clarity: the Committee is compelled to conclude that any such activity . . . would be subject to challenge in court." *Id.*

[20] *Id.* (emphasis added); *see id.* at 10-14 (letter from W. Vincent Rakestraw, Assistant Attorney General, to Hon. Peter W. Rodino, Jr., and letter from Robert H. Bork, Solicitor General, to Hon. Quentin N. Burdick); *see also id.* at 16 (statement of ICC Chairman George Stafford), noting that "the public inteerst is best served by guaranteeing the Commission the right which it presently has to defend its actions independent of the views of the Department of Justice." The concern was specifically raised about preserving ICC litigating authority at the Supreme Court level where the "Solicitor General assumes a more active role . . . ." *Id.*

thority specifically encompasses interventions, without leave of DOJ, in collateral proceedings like the present case is evident from a long history of such interventions.

C. The ICC Has Traditionally Exercised Independent Authority To Intervene To Protect Its Orders From Collateral Attack

Until the present case, the ICC without interference from DOJ has exercised its independent litigating authority to intervene in private lawsuits that it believes constitute a collateral attack on one of its orders. Members of the ATP are aware of at least twelve reported cases spanning the last four decades in which the ICC intervened without the United States.[21] The ATP members know of no case, reported or unreported, in which the Commission has asked permission of DOJ to intervene in a private dispute affecting the validity of an ICC order.

The courts have welcomed ICC intervention in such cases to assist in interpreting the ICC's orders. For example, in *Kansas City Terminal Ry Co. v. Hyman-Michaels Co.*, the district court remarked that "[b]oth the

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[21] *See Funbus Sys., Inc. v. California Public Utils. Comm'n*, 801 F.2d 1120 (9th Cir. 1986); *Kansas City Terminal Ry. Co. v. Jordan Mfg. Co.*, 750 F.2d 551 (7th Cir. 1984); *Cleveland-Cliffs Iron Co. v. Chicago & North Western Transp. Co.*, Nos. 81-1372, 81-1523 (6th Cir. 1982), *aff'g* 516 F. Supp. 399 (W.D. Mich.); *B.F. Goodrich v. Northwest Indus., Inc.*, 424 F.2d 1349 (3d Cir.), *cert. denied*, 400 U.S. 822 (1970); *Munitions Carriers Conference, Inc. v. American Farm Lines*, 415 F.2d 747 (10th Cir. 1969); *Baggett Transp. Co. v. Hughes Transp., Inc.*, 393 F.2d 710 (8th Cir.), *cert. denied*, 393 U.S. 936 (1968); *Baltimore & O. R. Co. v. Chicago Junction Ry. Co.*, 156 F.2d 357 (7th Cir. 1946); *Kansas City Terminal Ry. Co. v. Hyman-Michaels Co.*, 93 F.R.D. 362 (N.D. Ill. 1981); *Hanna Hining Co. v. Escanaba & Lake Superior R.R.*, 498 F. Supp. 1267 (E.D. Mich), *aff'd*, 664 F.2d 594 (6th Cir. 1981); *Lynch v. Public Service Comm'n of Nevada*, 376 F. Supp. 1033 (D. Nev. 1974); *Akers Motor Lines, Inc. v. Malone Freight Lines, Inc.*, 88 F. Supp. 654 (N.D. Ala. 1950); *Harris Transfer & Warehouse Co. v. Louisville & N. R. Co.*, 72 F. Supp. 389 (N.D. Ala. 1947).

court and the initial litigants will benefit from the ICC's assistance in defining the scope" of an ICC order at issue in the case.[22] In *B. F. Goodrich Co. v. Northwest Indus., Inc.*, the Third Circuit Court of Appeals disagreed with another case on the interpretation of section 5 of the Interstate Commerce Act, and observed that the other case was "a decision significantly made without benefit of Commission participation." [23]

Congress undoubtedly has known all along about this historical practice of ICC intervention in private lawsuits. The ICC under 49 U.S.C. § 10311 annually submits detailed reports to Congress explaining its significant litigation activities. Private lawsuits in which the Commission has intervened to protect the validity of an ICC order have been reported directly to Congress. In the 1968 annual report to Congress, for example, the ICC reported that it had intervened in *Munitions Carriers Conference v. American Farm Lines*,[24] a private dispute involving the lawfulness of defendants' transportation of certain traffic. In its 1969 annual report the ICC noted *Munitions Carriers* again, together with a companion case, "in both of which the Commission participated." [25] These reports, of course, were sent to Congress only a few years before it deliberated the Hobbs Act amendments in 1974 and expressly concluded that those amend-

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[22] 93 F.R.D. at 364.

[23] 424 F.2d at 1356. This reflects the rationale that supports the referral mechanism (28 U.S.C. § 1398) where there is an issue within the primary jurisdiction of the agency—the court, to do justice, should hear what the expert agency has to say on an issue within the agency's expertise. "[I]ssues of transportation policy . . . ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by th[e] Act." *United States v. Western Pacific R.R.*, 352 U.S. 59, 65 (1956).

[24] 415 F.2d 747 (cited and discussed in Interstate Commerce Commission, Eighty-Second Annual Report 88-89 (1968)).

[25] Interstate Commerce Commission, Eighty-Third Annual Report 97 (1969).

ments would leave the ICC's independent litigating authority intact.[26]

D. ICC's Litigating Authority Is An Exception To DOJ's Ordinary Power To Control And Supervise Government Litigation

The Solicitor General has no overriding statutory authority to veto the ICC's decision to participate in this case. However broad may be the statutory powers of the Attorney General (28 U.S.C. § 516) and the Solicitor General (28 U.S.C. § 518), they are subject to exceptions provided by Congress. In *United States v. Providence Journal Co.*, —— U.S. ——, 108 S. Ct. 1502 (1988), decided last term, this Court recognized that the independent litigating authority of the ICC constitutes such an exception.

As in the present case, the Solicitor General in *Providence Journal* wrote a letter to the Court which "denied the special prosecutor authority to represent the United States in this Court . . . ." [27] This Court dismissed the writ of certiorari after finding that "the court appointed prosecutor who sought certiorari and briefed and argued the case without authorization of the Solicitor General may not represent the United States before this court . . . ." [28] The Court reasoned that Supreme Court actions "in which the United States is interested" have to be conducted and argued by the Solicitor General under 28 U.S.C. § 518(a),[29] despite the prior, separate appointment of the special prosecutor.[30]

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[26] *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1977) (Congress is deemed to adopt preexisting judicial and administrative interpretation of a statute when it reenacts the statute without change).

[27] 108 S. Ct. at 1503.

[28] *Id.* at 1504.

[29] *Id.* at 1507.

[30] The basis for the Solicitor General's power, section 518(a), satisfies "the concern that the United States usually should speak with one voice before this Court, and with a voice that reflects not the parochial interests of a particular agency, but the common inter-

At the same time, however, this Court recognized that Congress in some instances has in fact created another voice for the government in the Supreme Court. The Court observed that "Congress has enacted some provisions that suggest exceptions to the blanket coverage of § 518(a)," including (1) the Tennessee Valley Authority, by virtue of its authority " 'to represent itself by attorneys of its choosing' "; (2) the independent counsel, by virtue of his or her authority under 28 U.S.C. § 601(a) "to initiate and conduct prosecutions 'in any court of competent jurisdiction . . . in the name of the United States' "; and (3) the ICC by virtue of its overall "independent litigating authority."[31] Like the TVA and the independent counsel, the ICC derives its independent litigating authority from a statute that empowers the Chairman to hire attorneys to represent the Commission "in any case in court" (49 U.S.C. § 10301(f)) as well as from one that authorizes it to "prosecute, defend or continue such action or proceeding unaffected by the action or inaction of the Attorney General" (28 U.S.C. § 2323).[32]

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ests of the Government and therefore all of the people." 108 S. Ct. at 1510. This familiar rationale for reserving Supreme Court litigation to the Solicitor General is usually qualified by the competing concern that the Solicitor General should not be a policy-meker (a "super agency") in developing the position of the United States. *See* McCree, "The Solicitor General and His Client," 59 Wash. U.L.Q. 337, 345 (1981).

[31] 108 S. Ct. at 1509 n.9 (citing Stern, " 'Inconsistency' in Government Litigation," 64 Harv. L. Rev. 759 (1951), for a discussion of the ICC's litigating authority).

[32] Perhaps another argument that there is a limitation to the Solicitor General's general control over government litigation in the Supreme Court is supported by the literal wording of section 518 of Title 28. Section 518 empowers the Solicitor General to "*conduct and argue* suits and appeals in the Supreme Court . . . in which the United States is interested" (emphasis added), but nowhere determines who *files* petitions and briefs in the Court. One authority suggests that section 518, therefore, "does not give the Solicitor General the veto power over which cases can be appealed to the

The ICC is permitted and indeed sometimes expected to raise a voice in court inconsistent with the DOJ.[33] The commentary cited by *Providence Journal* for the proposition that the ICC has independent litigating authority observed that

> if the Commission and the Department of Justice cannot agree as to what position should be taken, or whether a case should be appealed, no single authority has power to determine what should be done, and each agency can insist that its own views be presented to the courts.[34]

The DOJ in the past has acknowledged that Congress set the ICC apart from the executive branch and created an independent voice in government litigation. In 1978 then-Attorney General Griffin Bell explained that with the creation of the ICC Congress redefined DOJ's own role in government litigation:

> The creation of the first independent regulatory agency, the Interstate Commerce Commission, in 1887, with the express congressional intent that it not be under the control of the President or the executive branch, added a new dimension to what Congress intended the role of the Department of Justice to be.[35]

Attorney General Bell reviewed the various failed attempts by the executive branch to bring the ICC under the wing of the DOJ and concluded that the ICC was

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Supreme Court," MacIntyre, "The Status of Regulatory Independence," 29 Fed. B.J. 1, 8 (1969), even though the Solicitor General may have a unique position once they have been accepted for review.

[33] *See United States v. I.C.C.*, 337 U.S. at 432. Thus in the instant case, if the DOJ disagrees with the ICC's position, it is free also to intervene and to express its own views.

[34] Stern, " 'Inconsistency' In Government Litigation," 64 Harv. L. Rev. 759, 760-61 (1951).

[35] Bell, "The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, Or One Among Many?" 46 Fordham L. Rev. 1049, 1054 (1978).

granted as early as 1920 broad litigating authority to appear "in any case," independent of DOJ.[36]

The DOJ, therefore, is asserting control over the ICC against the grain of two statutes, decades of legislative history, and a backdrop of traditional ICC litigation practice of which Congress undoubtedly has been aware. This action by the Solicitor General, furthermore, is improper under *Providence Journal* and this Court's analysis of the statutory separation of the Solicitor General and the ICC, a separation recognized and heretofore observed in practice by the Attorney General.

II. EXECUTIVE CONTROL OVER THE ICC'S LITIGATING AUTHORITY WOULD UNDERMINE THE ICC'S ROLE AS AN INDEPENDENT REGULATORY COMMISSION WITHIN THE CONSTITUTIONALLY MANDATED SEPARATION OF POWERS

DOJ's attempt to preclude the ICC from presenting certain issues of transportation policy to this Court not only conflicts with long-standing congressional intent, but also raises a difficult question of constitutional separation of powers. As recently as *Morrison v. Olson*, No. 87-1279 (U.S. June 29, 1988), this Court indicated that interference by the executive branch with independent agents or agencies created by Congress can raise constitutional concerns as an overreaching of executive power.[37] The question is whether the ICC, by virtue of its status as an independent agency with statutory litigating authority, is protected from control by DOJ, an arm of the executive branch.[38] The ATP submits that it is.

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[36] *Id.* at 1056.

[37] Slip op. at 29-38.

[38] The DOJ appears to be challenging the validity of independent agencies in general as not legitimately beyond executive control. This concern is shared by other regulatory commissions. *See* Remarks of FTC Commissioner Terry Calvani, "The Federal Trade Commission: A Proposal For Radical Change," Trade Reg. Rep. No. 860 (CCH) (May 6, 1988).

The ICC, created by Congress in the Interstate Commerce Act of 1887 to administer and enforce the Act's requirement of non-discriminatory railroad rates[39] is the oldest independent regulatory commission[40] with far-reaching discretion to administer and adjudicate disputes involving railroads, motor carriers and water carriers. In the organic provisions of the Act, Congress provided at the outset in its description of the ICC that "[t]he Interstate Commerce Commission is an independent establishment of the United States Government."[41]

Congress in 1889 severed the ICC's only direct link to the executive branch when the Commission's reporting and administrative relationship with the Department of the Interior was discontinued and the ICC was required to submit annual reports directly to Congress.[42] Numerous attempts since 1889 by the executive branch to assert control over the Commission have been rejected by Congress, including, as discussed above, the proposal by President Taft in 1910 to put all litigation concerning ICC

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[39] Pub. L. No. 49-104, 24 Stat. 379 (codified as amended at 49 U.S.C. §§10101, *et seq.* (1982)). *See* Arpaia, "The Independent Agency—A Necessary Instrument of Democratic Government," 69 Harv. L. Rev. 483 (1956) ("[The] objective was the creation of a continuing expert regulatory machinery which would insure equal treatment and aid in bringing about the free flow of commerce throughout the nation at reasonable and nonpreferential rates, without unjust discrimination as to persons or localities.").

[40] "Independent regulatory commissions" are defined generally as agencies created by Congress to be separate from the executive branch. "By an 'independent reglatory commission,' then, is meant any commission, board, or authority which lies outside the regular executive departments and which has for its major job the exercise of some form of restrictive or disciplinary control over private conduct or private property." R. E. Cushman, *supra* note 8, at 4.

[41] 49 U.S.C. § 10301(a) (1982). In the words of one commentator "the Commission is no more a part of the national administration . . . than is the Supreme Court." 2 I.L. Sharfman, *The Interstate Commerce Commission* 454 (1931).

[42] Pub. L. No. 50-382, 25 Stat. 858 (1889) (codified as amended at 49 U.S.C. 10311 (1982)).

orders under the direct control of DOJ.[43] The President's authority with regard to the Commission, as presently constituted, properly begins and ends with the appointments power. For the executive branch to reach beyond that is to upset the constitutional separation of powers and checks and balances of power between the coordinate branches of government.[44]

In the seminal case *Humphrey's Executor v. United States*, 295 U.S. 602 (1935),[45] this Court made clear that improper encroachments on the authority of independent regulatory commissions by the executive branch are unconstitutional. This Court held in *Humphrey's Executor* that the executive branch is prohibited under the constitution from removing commissioners of an independent regulatory commission at will. Such action would be an overreaching by the executive branch on an agency created by Congress to be independent of the executive and to carry out legislative policy. Speaking of the

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[43] *See* Arpaia, *supra* note 39, at 487-490, discussing (1) the President's proposal in 1902 to transfer the ICC's duties to the Department of Commerce; (2) several plans in 1920-34 for dividing ICC powers; and (3) two bills introduced in 1947 to establish a Department of Transportation and subordinate the ICC to it—all of which failed to persuade Congress to alter the independent status of the ICC. *See also* Bell, *supra* note 35, at 1049-55.

[44] There have been various proposals during recent years to curtail the Commission as an independent agency and to transfer those regulatory functions not totally eliminated to the Department of Transportation. *See, e.g.*, S. 711, 100th Cong., 1st Sess., 133 Cong. Rec. S 3005 (daily ed. March 11, 1987); H.R. 1155, 100th Cong., 1st Sess., 133 Cong. Rec. H 734 (daily ed. February 19, 1987); S. 539, 100th Cong., 1st Sess., 133 Cong. Rec. S 2228 (daily ed. February 19, 1987). The ATP takes no position as to whether, as a matter of policy, such legislation should be enacted. Our position is simply that unless and until Congress enacts legislation placing the ICC or its functions within the executive branch, the type of control that DOJ here asserts is inconsistent with the constitutional framework of separation of powers.

[45] The continuing validity of *Humphrey's Executor* was recently squarely reaffirmed in *Morrison v. Olson*, No. 87-1279, slip op. at 28-35.

Federal Trade Commission, this Court stated a rule that applies equally to the ICC:

> The Commission [FTC] is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. *Like the Interstate Commerce Commission*, its members are called upon to exercise the trained judgment of a body of experts . . . *a body which shall be independent of executive authority, except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of government.[46]

The principal reason for independent commissions is to check and balance executive power in selected areas of legislative concern. It follows that independent commissions "are not directly accountable to the President. They lie outside the executive department . . . . [O]nly in very limited circumstances, if at all, can the President compel the commissions to conform to his policies."[47]

The Solicitor General's coercive action here is inconsistent with the balance of powers among the branches of government and the nature of an independent regulatory commission within that framework of coordinate power recognized by *Humphrey's Executor*. In intervening in private litigation to protect the validity of its orders, the ICC (the *model*[48] for independent commissions in our government) is accomplishing the statutory mission that Congress entrusted to it. By seeking to prevent the ICC

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[46] 295 U.S. at 624, 625-26 (emphasis added); *see also*, 4 I.L. Sharfman, *The Interstate Commerce Commission* 259 (1937).

[47] R. E. Cushman, *supra* note 8, at 667.

[48] One commentator observed that of all the independent agencies, "the ICC is the most independent." W. L. Cary, *Politics And The Regulatory Agencies* 32 (1967).

from having a voice in such cases, the DOJ is interfering with that mission at a critical moment—the moment when law is applied to a concrete set of facts. It is no more constitutional for an arm of the executive, the DOJ, to preclude the ICC's access to the courts, pursuant to its statutory litigating authority, when the validity of one of its orders is under collateral attack, than it is for the President to remove a commissioner at will (as in *Humphrey's Executor*).

CONCLUSION

This Court should accept the ICC's petition for a writ of certiorari despite the Solicitor General's letter to the Clerk attempting to revoke the ICC's authority to litigate. Such an assertion of power by a department of the executive branch disregards the statutes and their legislative history, the ICC's long-standing practice of intervening in collateral actions to protect its orders, and separation of powers between the executive branch and the legislative branch that created the ICC as an independent regulatory commission.

Respectfully submitted,

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